

2017 ERISA Advisory Council
Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with
respect to Employment-Based Health Benefit Plans in the Private Sector
Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and
Sponsors
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Submission of
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Karin S. Feldman
Benefits and Social Insurance Policy Specialist

On behalf of the 55 national and international labor unions that collectively represent 12.5 million working people, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) appreciates the invitation to address the Council as it considers ways to enhance the effectiveness of mandated disclosures for participants in employment-based health benefit and retirement plans.

The AFL-CIO works every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men and make their voices heard in corporate boardrooms and the financial system.

Union members have a tremendous investment in both the private-sector pension and retirement savings system and workplace health benefits. Over 80% of union workers employed in private industry participate in workplace retirement plans, compared to just over 45% of non-union workers.¹ While the vast majority of private-sector union workers are covered by defined benefit pension plans (65% compared to 10% of non-union workers), an equal percentage (44%) of union and non-union workers participate in defined contribution plans.² More than one-in-four dollars in ERISA-covered retirement plans (27%)—totaling \$ 2.3 trillion in assets—are in collectively bargained defined benefit and defined contribution plans.³ With respect to health

¹ U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016, Bulletin 2785* (July 2016) t. 2 (private industry workers), available at <https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf>.

² U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016, Bulletin 2785* (July 2016) t. 2 (private industry workers), available at <https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf>.

³ Calculated from U.S. Dept. of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2014 Form 5500 Annual Reports* (Sept. 2016 v. 1.0) t. A6, available at

care benefits, almost 80% of union workers employed in private industry participate in plans providing medical care, compared to only 46% of non-union workers.⁴

Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering and overseeing the assets of multi-employer retirement and health plans. In other groundbreaking arrangements, unions preserved retiree health benefits by reaching agreements with employers to fund those benefits and creating trusts, administered by union-designated and public representatives. Across the country, jointly-administered health plans as well as collectively bargained single employer plans are developing programs to make preventive care as well as care for chronic conditions available at little or no cost to workers, retirees and their families in order to improve their health and lower future health care costs for plans and their sponsors.

With so much at stake for working people, the AFL-CIO and our affiliate unions have advocated for legislative and regulatory improvements to strengthen protections for workers and retirees since ERISA's enactment. The work the Council is undertaking this year is an important step forward towards improving disclosures and making them more meaningful and useful to workers, retirees and their families.

Quick Reference Guide to Summary Plan Description

The Council has drafted sample Quick Reference Guides ("Guides") for a 401(k) plan and health care plan for review and comment by invited witnesses. The AFL-CIO hopes its comments and suggestions on these Guides, as well as the other draft disclosures, prove helpful.

As a general matter, the AFL-CIO supports the concept embodied by the Guides as they can provide a useful roadmap to the details included in the Summary Plan Description ("SPD"). We know many single employer and multi-employer plan sponsors include similar introductory material for pension and savings and health care benefits plans. These introductions provide an overview of key plan features, outlining the benefits available to workers, retirees and their families as well as where to find more detailed information. In some instances, they also advise participants and beneficiaries of their rights under ERISA.

The current drafts of the Guides are, in our view, a good beginning, but they could be improved by simplifying the text and presenting complex information in an easier-to-read manner. For example, in the Health Care Plan Guide, there are numerous paragraphs describing multiple ways in which coverage continues or ends and each of those paragraphs is difficult to parse. It may be more useful to list the ways in which coverage might continue or end, as Part C of the Guide does in describing "things to know" about all the coverage programs.

<https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2014.pdf> .

⁴ U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2017, USDL-17-1013* (July 2017) t. 2 (private industry workers), available at U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, available at <https://www.bls.gov/news.release/pdf/ebs2.pdf>.

The description of the claims and appeals process in the Health Care Plan Guide is confusing, at best, and perhaps due to the choice to keep it very simple. But, too much is lost in that effort, perhaps due to the suggestion that a conversation about the Explanation of Benefits (“EOB”) be the first step. Unfortunately, the EOBs themselves are incomprehensible, even to the most expert benefits professionals. Prior Council Reports⁵ have recommended the development of a standardized EOB and we urge the Council to consider engaging in that challenge. In addition, a claim may involve eligibility, not just a benefit and the text does not make that clear.

The 401(k) Plan Guide, on the other hand, makes no mention of the availability of a claims procedure, a significant omission to address in the next draft. While there may be fewer claims under 401(k) plans than traditional pension plans, a claims procedure is still required and participants should know their right to have disputes addressed.

The AFL-CIO appreciates the drafters recognizing plans may be maintained in whole or in part as the result of collective bargaining. But, the various references in both Guides will raise more questions and potentially result in disputes between the negotiating parties. Simply saying “subject to any collective bargaining obligations” as a qualification to the ability of plan sponsor to change or terminate the plan is not clear and that type of language will and has led to disputes. In our view, language of that kind is also not appropriate when benefits are provided through a jointly-administered multi-employer plan.

We also recommend that any technical terms used should be defined. For example, in Part D of the 401(k) Plan Guide, three types of contributions are described. Two are explained while one—Roth—is not and there’s no explanation of, or reference for, “qualified distribution” which is unlikely to be described in “Types of Contributions.” Similarly, in the Health Plan Guide, the list of “things to know” includes tabs with acronyms that are not in the descriptions or the tab does not include the full description.

Part G of the 401(k) Plan Guide is a partial explanation of the costs of a plan and a more detailed explanation might be more helpful.

The proposal to eliminate the distribution of SPDs whether it applies only to 401(k) plans or to all other retirement and health care plans covered by ERISA is one we urge the Council to reject. Doing so shifts the burden to workers, retirees and their beneficiaries in an inappropriate manner, forcing them to act. There should be other methods considered for reducing any perceived burden and cost including redesigning the SPD so it becomes what it was intended to be and not a legal defense document.

⁵ See, e.g. 2010 Advisory Council Report on Health Care Literacy *available at* <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/health-care-literacy>.

Fee Disclosure Proposal under §2550.404a-5

The AFL-CIO is concerned that the Fee Disclosure Proposal (“Proposal”) will not provide participants with adequate information to assess the investment options available under the plan and the differing features among those options with respect to, among other things, rate of return, fees and restrictions. The sample Fund Fact Sheet does not appear to include the information described in the Proposal illustrating the risk of the fund “relative to the other funds in the plan.”

The Proposal relieves the plan sponsor of the responsibility and perceived burden of preparing the Model Comparative Chart included in the current regulations, and it does by shifting the burden of determining the comparative performance and fees to workers and beneficiaries. From our perspective, the Proposal should not be adopted by the Council. There is simply no justification for asking workers and beneficiaries—most of whom are not sophisticated investors—to be analysts and search out the information needed to make a meaningful comparison.

If there are concerns about the complexity of the Model Comparative Chart and the additional disclosures about plan level expenses, then the appropriate approach is to evaluate the current designs and determine whether they can be simplified or made more useful. The answer can not be to return to the days before the 2012 adoption of the fiduciary requirements set forth in the current rule and that is effectively what the Proposal does. The inclusion of plan level expenses in the proposed Plan Guide and in participant quarterly statements reflects only a small portion of the fees and expenses ultimately affecting retirement savings. The most significant investment related fees and expenses are left to workers, retirees and beneficiaries to determine.

Consolidation of Notices

The AFL-CIO supports the concept of consolidating annual notices for both pension and retirement savings and health care benefit plans so long as it is done in a careful and thoughtful manner. We appreciate that some notices contain duplicative information and recognize that the timing of them is not well-coordinated with the delivery of other required disclosures. In order for any consolidation to be helpful to workers, retirees and their beneficiaries, it should clearly identify what the notices address and their import in particular circumstances. What should not be included in any consolidation are notices tied to triggering events, such as retirement, termination of employment or the loss of health care coverage. These event-related notices should continue to be provided as required by law and applicable regulations.

While the AFL-CIO recognizes that the Council and the Department of Labor (“DoL”) only have jurisdiction over the disclosures required by ERISA, there are a multitude of notices and disclosures done in coordination with other departments and agencies, including the Departments of the Treasury and Health and Human Services, the Centers for Medicare & Medicaid Services, the Internal Revenue Service and the Pension Benefit Guaranty Corporation. In considering the streamlining of disclosures and potential consolidation of annual notices, the Council and DoL should take into account notices and disclosures done in coordination with other departments and agencies. Doing so will address what is often perceived as a flood of

information received by workers, retirees and their families that many find confusing and overwhelming.